APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17,179

June 26, 1961

UNITED STATES OF AMERICA, EX REL. L. B. BINION, *Appellant*,

v.

UNITED STATES MARSHAL FOR THE DISTRICT OF NEVADA,
Appellee.

On Appeal from the United States District Court
for the District of Nevada

Before: HAMLIN, JERTBERG and MERRILL, Circuit Judges.

HAMLIN, Circuit Judge:

On June 12, 1960, L. B. Binion, appellant herein, was taken into custody by the United States Marshal for the District of Nevada, appellee herein, upon a judgment and commitment entered in the United States District Court for the Western District of Texas on December 14, 1953. On the same day appellant filed a petition for a writ of habeas corpus in the United States District Court for the District of Nevada in order to test the validity of his detention, and he was immediately released on bail. On November 9, 1960, the district court discharged the writ, and on November 10th appellant appealed to this court.[1]

The record discloses an undisputed, but yet complicated, factual situation. On September 3, 1952, appellant entered a plea of nolo contendere in the United States District Court for the District of Nevada to an indictment charging income tax evasion for the year 1949. He was sentenced to pay a fine of $15,000, the imposition of a prison sentence

[1] The district court had jurisdiction under the provisions of 28 U.S.C.A. § 2241, and this court has jurisdiction of the appeal under the provisions of 28 U.S.C.A. § 1291.

was suspended, and he was placed on probation for five years.

On December 14, 1953, in the United States District Court for the Western District of Texas, appellant pleaded guilty to two indictments charging income tax evasion for the years 1947 and 1948. A fine of $20,000 was imposed, and he was sentenced to three concurrent terms of five years each to be followed by probation for three years. He commenced the service of the sentences on December 14, 1953.

In August, 1956, appellant filed a motion under 28 U.S.C.A. § 2255 to correct the Texas sentences, alleging that they were excessive. The district court denied this motion and an appeal was taken to the Court of Appeals for the Fifth Circuit.[2] On March 11, 1957, upon the application by appellant, the Supreme Court granted his release on bail pending final decision. Accordingly, on March 19th appellant was released on $25,000 cash bail. On that day, according to appellee, there remained 3 months 27 days to be served on the Texas sentences prior to eligibility for mandatory release under the provisions of 18 U.S.C.A. § 4164.[3]

On June 28, 1957, the Court of Appeals for the Fifth Circuit affirmed the district court's denial of appellant's motion to correct sentence,[4] and the Supreme Court sub-

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[2] At that time *United States* v. *Achilli*, 234 F. 2d 797 (7th Cir. 1956), which involved the same question, was pending before the United States Supreme Court; and the Fifth Circuit entered an order deferring a determination of appellant's case pending a decision by the Supreme Court in *Achilli*.

[3] Appellant contends that at that date he had only 3 months and 20 days remaining to be served, but in our view of the case the discrepancy is immaterial at this time.

[4] The opinion of the court is reported as *Binion* v. *United States*, 245 F. 2d 466 (5th Cir. 1957), and is based on the fact that the Supreme Court decided the Achilli case contrary to appellant's contention. *Achilli* v. *United States*, 353 U.S. 373 (1957).

sequently denied certiorari.[5] On October 16, 1957, appellant surrendered to the United States Marshal at Philadelphia, Pennsylvania, and on the same day he filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania. He was released on bail in the sum of $5,000 pending hearing on the petition, and order to show cause why the writ should not be granted having been issued.

At the time of the hearing on the order to show cause, sixteen exhibits and a stipulation signed only by appellant's counsel were admitted into evidence, no witnesses being called by either side. From these exhibits and the stipulation it appeared that appellant, upon his release on bail on March 19, 1957, reported to the probation officer for the District of Nevada in accordance with the order of the United States District Court for Nevada made September 3, 1952, placing appellant on probation for five years and requiring him to report once every 60 days. The probation officer requested appellant to report once a week, a request with which appellant complied. On September 3, 1957, the five-year probation period terminated and on September 13, 1957, an order to that effect was signed by the district court. The probation officer, nevertheless, instructed Binion to continue reporting weekly pending clarification of his status. On September 19, 1957, the probation officer wrote to the United States Board of Parole stating that appellant was continuing to report to him and requesting information as to his status. The Board of Parole replied on October 21, 1957, advising that appellant was not reporting pursuant to any order or request by the Board; that he was not in the custody of the Attorney General while free on bail; and that, consequently, there was no requirement by the Board that he report to

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[5] *Binion* v. *United States*, 355 U.S. 384 (1957).

the probation officer. Binion was advised of this communication on October 23 and did not report thereafter.[6]

On the basis of this evidence, the District Court for the Eastern District of Pennsylvania held that appellant should be given credit on his sentence for the period from March 19, 1957, to October 23, 1957, and that therefore appellant's sentence had been completed, and he was entitled to be released. Accordingly, on December 22, 1958, the district court signed an order discharging appellant from custody. The government appealed from this order and the Court of Appeals for the Third Circuit reversed the district court on December 9, 1959, holding that appellant was not entitled to credit for the period from March 19, 1957, to September 3, 1957, (while his probationary period was still in effect) but that he was entitled to credit for the period from September 3, 1957, to October 23, 1957.[7] The application of appellant for certiorari was denied on June 6, 1960.[8]

On June 10, 1960, appellant attempted to surrender to a Deputy United States Marshal for the District of Nevada who, after consultation with the United States Attorney, refused to accept him. On June 13, 1960, the Court of Appeals issued its mandate and on July 5, 1960, the district court ordered appellant remanded to the custody of the Attorney General. On July 12, 1960, appellant was taken into custody, but immediately filed a petition for a writ of habeas corpus and was admitted to bail.

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[6] During the period from March 19, 1957, through October 23, 1957, appellant left the District of Nevada on six occasions, making trips to Pennsylvania, California and Montana. During one absence he stayed at his ranch in Montana for a period of two and one-half months and made contact with the probation officer by telephone.

[7] *United States ex rel. Binion* v. *O'Brien*, 273 F. 2d 495 (3d Cir. 1959).

[8] *Binion* v. *O'Brien*, 363 U.S. 812 (1960).

On August 15, 1960, a hearing was held in the District of Nevada, at which the evidence set out above was received. On November 9, 1960, the district court discharged the writ of habeas corpus and remanded appellant to the custody of the marshal. Appellant immediately filed a notice of appeal to this court and was released on bail.

Appellant's contention that he has completed service of the sentence imposed in the Texas court is based upon his claim that he was in custody and therefore entitled to credit upon his sentence for three separate periods of time. His first contention is that he is entitled to credit from December 22, 1958 when he was discharged from custody by the District Court of Pennsylvania, until the government's appeal from the district court's order was filed. Secondly, he contends that he is entitled to credit against his sentence for the period from March 19, 1957, through October 23, 1957, when he was reporting to the Nevada probation officer. Thirdly, he contends that he is entitled to credit against his sentence for the period from June 10, 1960, when he unsuccessfully attempted to surrender to the United States Marshal, throagh July 12, 1960, when he was finally taken into custody by the Marshal.

The claim of appellant that he is entitled to credit upon his term from the time of the district court's order discharging him through the time when the government took its appeal cannot be sustained. A similar contention was made in *Patterson* v. *Jones*, 141 F. 2d 319 (9th Cir. 1944), and this court ruled adversely to the appellant's contention, citing *Anderson* v. *Corall*, 263 U.S. 193 (1923); *United States* v. *Greenhaus*, 89 F. 2d 634 (2d Cir. 1937); *In re Collins*, 8 Cal. App. 367, 97 Pac. 188 (1908); *Ex parte Vance*, 90 Cal. 208, 27 Pac. 209 (1891); *Dolan's Case*, 101 Mass. 219; and *Minnesota* v. *Jorgensen*, 176 Minn. 572, 224 N.W. 156 (1929). During the period from appellant's discharge by the district court in Pennsylvania until the time of the government's appeal from that order, appellant

was not in custody, either constructively or otherwise, and can receive no credit upon his Texas sentence for that period of time.

Similarly, appellant can receive no credit upon his sentence for the period between June 10, 1960, when he attempted to surrender (with his attorney present to file an immedite petition for habeas corpus), and July 12, 1960, when he was taken in custody by the marshal. It appears that on June 10th appellant entered the office of the United States Marshal in Las Vegas, Nevada, and told the marshal that he was surrendering on the strength of the order of the United States Supreme Court denying certiorari. The marshal asked him to have a seat and went in search of legal advice. Shortly thereafter he returned and told appellant that he had no authority to hold him and would not do so. At that time neither the United States Marshal nor the United States District Court had received any communication of any kind from the Supreme Court that the petition of appellant for certiorari had been denied. He only had the statement of appellant to that effect.[9] It was not until July 5, 1960, that the United States District Court for the Eastern District of Pennsylvania ordered appellant to be remanded to the custody of the Attorney General of the United States. From June 10, 1960, to July 12, 1960, appellant was not in custody, either actually or constructively, and this time cannot be credited upon his sentence.

The last period to be considered—from March 19, 1957, to October 23, 1957, when appellant was reporting to the

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[9] Sup. Ct. R. 59(3). "In cases coming from federal courts, a formal mandate shall not issue unless specially directed. In the absence of such direction, it shall suffice for the clerk to send to the proper court, within the time and under the conditions set out in paragraph 2 of this rule, a copy of the opinion or order of this court, and a certified copy of the judgment of this court, which in cases under this paragraph shall include provisions for the recovery of costs if any are awarded."

probation officer in Nevada—may properly be divided into two periods: (1) from March 19, 1957, to September 3, 1957; and (2) from September 3, 1957, to October 23, 1957. During the first of these two periods the five-year period of probation fixed by the District Court of Nevada in 1952 was still in effect. One of the terms of that probation required appellant to report once every 60 days to the probation officer. However, it is admitted that during this period, and indeed until October 23, 1957, the probation officer requested appellant to report either in person or by telephone at least once a week, and appellant did so report.

In *United States ex rel. Binion* v. *O'Brien*, *supra*, the Third Circuit in considering the first of these two periods, stated that Binion "was a probationer under the Nevada sentence which clearly required reporting to his probation officer," and that during this time "he had a duty to report, for the Supreme Court's action on his request for bail did not purport to affect his status as a probationer under the Nevada sentence, but rather only went to his status under the Texas sentence." The Third Circuit further held that the frequency of the reporting during this period did not create a different status for Binion. Consequently, that court held that during that time up until September 3, 1957, Binion was entitled to no credit upon his Texas sentence. With this holding of the court in that case we agree.

This leaves only the period from September 3, 1957, to October 23, 1957, to be considered. This totals 50 days. Inasmuch as even under appellant's calculation there were 110 days left to be served upon his Texas sentence when he was released on bail, he would not now be entitled to be released even if he should be given credit for this 50 days upon his sentence. At this time we express neither approval nor disapproval of the holding of the Third Circuit that appellant was entitled to this 50 days credit.

The petitioner is only entitled to be released under a writ of habeas corpus if he is illegally restrained of his liberty. Under our holding in this case, and regardless of whether the last-mentioned 30-day period is or is not allowed to appellant, he is not now entitled to be released. A further period of time must be served by appellant in order for him to complete his sentence.

The judgment of the district court discharging the writ of habeas corpus is affirmed.

(Endorsed) Opinion Filed June 26, 1961.

FRANK H. SCHMID, *Clerk*.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17179

UNITED STATES OF AMERICA, EX REL. L. B. BIXION, *Appellant*.

v.

UNITED STATES MARSHAL FOR THE DISTRICT OF NEVADA, *Appellee*.

Judgment

Appeal from the United States District Court
for the District of Nevada

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment
Filed and entered June 26, 1961
FRANK H. SCHMID, *Clerk*

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Friday, August 4, 1961

Before: Hamlin, Jertberg, and Merrill, Circuit Judges

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant filed July 21, 1961 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is, denied.

APPENDIX D

United States Constitution, Fifth Amendment:

No Person shall * * * be deprived of life, liberty, or property, without due process of law; * * *

Title 28, U.S.C.:

§ 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances.

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. * * *

§ 2243. Issuance of writ; return; hearing; decision

* * *

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

Title 18, U.S.C.:

§ 3568. Effective date of sentence

The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence.

If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.

No sentence shall prescribe any other method of computing the term.

§ 4163. Discharge

A prisoner shall be released at the expiration of his term of sentence less the time deducted for good conduct. A certificate of such deduction shall be entered on the commitment by the warden or keeper.

§ 4164. Released prisoner as parolee

A prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days. • • • (As amended, June 29, 1951, c. 176, 65 Stat. 98)

§ 4203. Application and release; terms and conditions

(a) • • • Such parolee shall be allowed in the discretion of the Board, to return to his home, or to go elsewhere, upon such terms and conditions, including personal reports

from such paroled person, as the Board shall prescribe, and to remain, while on parole, in the legal custody and under the control of the Attorney General, until the expiration of the maximum term or terms for which he was sentenced. • • •

§ 4042. Duties of Bureau of Prisons

The Bureau of Prisons, under the direction of the Attorney General, shall—

(1) have charge of the management and regulation of all Federal penal and correctional institutions;

(2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;

• • •

§ 4086. Temporary safe-keeping of federal offenders by marshals

United States marshals shall provide for the safe-keeping of any person arrested, or held under authority of any enactment of Congress pending commitment to an institution.

Federal Rules of Criminal Procedure:

Rule 38. Stay of Execution, and Relief Pending Review

(a) Stay of Execution.

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(2) Imprisonment. A sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail.

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Rule 62. Stay of Proceedings to Enforce Judgment

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(d) Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay
• • •

(e) Stay in Favor of the United States or Agency Thereof. When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

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Rules of the United States Supreme Court:

Rule 25. Order Granting or Denying Certiorari.

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2. No mandate issues upon the denial of a petition for writ of certiorari. Whenever application for a writ of certiorari to review a decision of any court is denied, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record. Such notification will not be withheld pending disposition of a petition for rehearing except by order of the court or a justice thereof.

Rules of the United States Court of Appeals for the Third Circuit:

Rule 15. Custody of Prisoners Pending Appeal in Habeas Corpus Proceedings.

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(3) If Prisoner Discharged. Pending review of a decision discharging a prisoner on habeas corpus, he shall be enlarged upon recognizance, with surety, for his appearance to answer and abide by the judgment in the appellate proceedings; and if in the opinion of the court or judge rendering the decision surety ought not to be required the personal recognizance of the prisoner shall suffice.

(4) Upon Review in Supreme Court. The initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in this court but also the further possible review in the Supreme Court; * * *

Rule 36. Mandate.

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(2) Certiorari to Supreme Court—Duration of Stay.

In any case where a stay of the mandate is applied for on the ground that it is desired to make application to the Supreme Court of the United States for a writ of certiorari, such stay will be made for a further period of 30 days, and if within the said period of 30 days, there shall be filed with the clerk of this court a certificate from the clerk of the Supreme Court to the effect that there has been filed in that court the certiorari petition, record and brief, and proof of notice thereof as required by the Supreme Court, the stay of the mandate of this court shall continue until final disposition of the case by the Supreme Court. Immediately upon the filing in this court of a copy of the order by the Supreme Court denying the writ applied for, the mandate of this court shall be issued.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,891

UNITED STATES OF AMERICA, EX REL. L. B. BINION

v.

WILLIAM A. O'BRIEN, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF PENNSYLVANIA, *Appellant.*

On Appeal From the United States District Court for the Eastern District of Pennsylvania

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Argued October 6, 1959

Before BIGGS, *Chief Judge*, and MCLAUGHLIN and STALEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed December 9, 1959)

By STALEY, *Circuit Judge.*

This is an appeal by the government from the grant by the district court of a writ of habeas corpus. It presents the unique problem of a relator who asserts that he is entitled to credit on his sentence for the period he was subjected to supervision by a federal probation officer while on bail from that sentence.

The relator, Binion, was indicted for evasion of his income tax for the year 1949 in violation of Section 145(b) of Title 26, U.S. Code, 26 U.S.C.A. (1939) § 145(b). He entered a plea of nolo contendere in the United States Dis-

trict Court for the District of Nevada on September 3, 1952, and was sentenced to pay a fine, which was duly paid, and placed on probation for a period of five years from September 3, 1952, to September 3, 1957. The probation was conditional upon Binion's reporting every sixty days to the federal probation officer, and there was no violation of any of the conditions of the probation.

Thereafter, on December 14, 1953, Binion pleaded guilty to two indictments charging income tax evasion for the years 1947 and 1948. He was fined $20,000 and sentenced to three imprisonment terms of five years each, to run concurrently, and to be followed by probation for three years. Service of the sentences commenced the same day, when he was committed to the custody of the Marshal for the Western District of Texas.

After serving more than two and one-half years in the United States Penitentiary at Leavenworth, Kansas, Binion filed a motion for correction of his sentence pursuant to 28 U.S.C. § 2255. This motion was denied, and an appeal was taken to the United States Court of Appeals for the Fifth Circuit. Action on the appeal was deferred on September 22, 1956, pending the decision of the Supreme Court in Achilli v. United States, 353 U.S. 373 (1957). One month later Binion made application to the district court for release on bail, and his request was denied. Subsequently, on February 14, 1957, the court of appeals also denied his request. Four days later he made application to the Supreme Court, and on March 11, 1957, the Supreme Court admitted him to bail, pending disposition of the Achilli case, upon a bond in the sum of $25,000. The bond having been posted, the United States District Court for the Western District of Texas on March 18, 1957, ordered Binion released, and he was released the following day. At the time of his release he had three months and twenty days remaining to serve on the Texas sentence in order to be eligible for mandatory release.

On March 21, 1957, Binion reported to the Chief United States Probation Officer in Las Vegas, Nevada, and continued to report to him until ordered back to the penitentiary. The Nevada probation order had required him to report to the probation officer every sixty days from September 3, 1952, until September 3, 1957. While free on bail, in addition to the conditions of probation imposed by the Nevada sentence, Binion was required by the probation officer to report by personal contact not less than once a week, and he did so.

The Supreme Court handed down its decision in Achilli v. United States, 353 U.S. 373, on May 27, 1957. In accordance therewith the court of appeals affirmed the district court's denial of the motion to correct Binion's sentence, 245 F. 2d 466 (C.A. 5, 1957). Binion then filed a petition for writ of certiorari which was denied on October 14, 1957, 355 U.S. 834. Two days later he surrendered to the United States Marshal at Philadelphia. However, on the same day, he filed a petition for writ of habeas corpus and was released on October 17 on $5,000 bail pending decision thereon.

The district court found that the Nevada probation officer required relator to report in the same manner as a parolee from March 19 to October 23, 1957, a period far greater than the three months and eighteen days remaining to be served on his sentence of imprisonment.[1] Recognizing that parole is an ameliorated imprisonment, the court was of the opinion that Binion earned confinement time unless there were other factors in the case that would alter the effect of the reporting. The most important "other factor" considered by the district court was Binion's status while out on bail. On this point the district court concluded that

[1] It is agreed that Binion should be credited with the two days he spent in jail in Philadelphia after surrendering to the Marshal, October 16 and 17, 1957. This reduces the remaining time from three months and twenty days to three months and eighteen days.

"when relator was released on bond by order of the Supreme Court he was under no restraint other than the usual limitation of action imposed on one released on bail." Accordingly, the petition for writ of habeas corpus was granted.

The rule which calls upon an appellate court to support findings of fact of a district judge unless clearly erroneous, Fed. R. Civ. Proc. Rule 52(a), is inapplicable insofar as it is bottomed upon the trial court's opportunity to observe the demeanor of the witnesses, for the case was submitted on brief and documents. See United States v. United Steelworkers of America, F. 2d (C.A. 3, decided Oct. 27, 1959). In addition, our review of the ultimate facts is not in any way circumscribed by the clearly erroneous rule.

Initially, we must consider Binion's status when placed on bail by the Supreme Court. We cannot agree with the district court that Binion, when enlarged on bond, was under no restraint other than the usual limitations of one so freed. On the contrary, Binion at that time, March 19, 1957, and until September 3, 1957, was a probationer under the Nevada sentence which clearly required reporting to his probation officer. To ignore the explicit terms of the Nevada sentence would be clearly unwarranted. It is true that, while incarcerated, he was not required to affirmatively report, for in fact he could not do so. However, upon release, the terms of his probation became operative, and he had a duty to report, for the Supreme Court's action on his request for bail did not purport to affect his status as a probationer under the Nevada sentence, but rather only went to his status under the Texas sentence. In essence, Binion desires double credit—for completion of his probation and completion of his sentence of imprisonment for the same reporting to or contact with his probation officer. Since he had a duty to report under the Nevada probation order until September 3, 1957, he cannot be given credit on his later sentence for reporting done prior to that date.

The frequency of the reporting during this period does not create a different status as does a requirement to report when there is no duty to report at all.

This brings us to the period of reporting required by the probation officer following termination of the probation, that is, September 3, 1957, through October 23, 1957. The probation officer requested instructions from the Parole Board Executive in Washington with regard to Binion's status and while awaiting instructions required Binion to continue reporting.[2] As to this period of one month and twenty days, the conclusion of the district court which we have considered above is most apt. Binion had no duty to report and was under no restraint other than hat imposed on one released on bail. Regardless, he was required by the probation officer to continue to report weekly.

The district court found that Binion reported in the same manner as a parolee or a person who was conditionally released for supervision. This finding is based in part upon the statement of the probation officer that "Binion reported to me in the same manner as I would require a parolee or C.R. [conditional releasee] to report for supervision." The court, recognizing that Binion was not on parole de jure, nevertheless concluded on the facts that he was on parole de facto.

The government does not question that parole is in legal effect imprisonment, albeit an ameliorated form thereof, Anderson v. Corall, 263 U.S. 193 (1923); Jenkins v. Madigan, 211 F. 2d 904 (C.A. 7), cert. denied, 348 U.S. 842 (1954); but contends that the status of parole can only be created through the procedures laid down in statutes

[2] The Parole Board failed to reply to this letter of September 19, 1957, until October 21, 1957 (received by the probation officer on October 23, 1957). The letter indicated that Binion was not reporting pursuant to any order or request by the Board and that he was not in the custody of the Attorney General while free on bail.

and regulations. Certainly, this is the case as regards parole de jure. This argument, however, begs the question, for the real issue is whether Binion should be credited with the period during which he was restrained by an officer clothed with the apparent authority to do so.

The government attempts to distinguish the actions of the probation officer here from those of the marshals or wardens in the following cases where credit was given for improper action taken by them. Smith v. Swope, 91 F. 2d 260 (C.A. 9, 1937); Albori v. United States, 67 F. 2d 4 (C.A. 9, 1933); White v. Pearlman, 42 F. 2d 788 (C.A. 10, 1930); Price v. McGuinness, 269 Fed. 977 (C.A. 3, 1920); United States v. Jones, 147 F. Supp. 268 (D.C. Md. 1957); in re Jennings, 118 Fed. 479 (E.D. Mo. 1902). No logical distinction can be drawn between these cases and that at bar. They stand for the proposition that where an individual's liberty is restrained by the act of an officer of the United States having authority to exercise restraint, such individual is entitled to credit for the period of that restraint towards service of his sentence. The probation officer here had actual authority by virtue of the Nevada sentence to require Binion to report during the period of that sentence, i.e., until September 3, 1957. Thereafter, since Binion no longer had the status of a probationer, the officer was devoid of authority to require further reporting. Nevertheless he required relator to do so until October 23, 1957. Based upon the cases cited supra, it appears to us that Binion is entitled to credit on his Texas sentence of imprisonment for that period during which he was required to report following expiration of his Nevada sentence of probation, since his status then was solely that of one released on bail.

The cases cited by the government in regard to estoppel completely fail to support its position, for they involve contract considerations and, of course, are not applicable here where an individual's liberty is at issue. Likewise,

Binion's contention that he has a right not to serve his sentence in instalments is hardly persuasive, for it was his action, vigorously contested by the government, that resulted in his release on bail. We have considered the other points raised by the parties but find them to be insubstantial.

In accordance with the foregoing opinion, the judgment of the district court will be reversed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX F

Opinion

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. M-1888

UNITED STATES OF AMERICA, EX REL L. B. BINION

v.

WILLIAM A. O'BRIEN, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF PENNSYLVANIA

December 17, 1958.

WELSH, J.

This is the petition of relator, L. B. Binion, for a Writ of Habeas Corpus.

On September 3, 1952, relator pleaded nolo contendere to an indictment charging violation of Title 26 U.S.C., Section 145(b) for the year 1949. The judgment of the United States Court for the District of Nevada was a fine and probation for five years. The fine was paid.

Relator on December 14, 1953, pleaded guilty to two indictments charging violation of Title 26 U.S.C., Section 145(b), by filing fraudulent income tax returns for 1947 and 1948 in the Western District of Texas.

The judgment of the Court was a fine and that he serve three five-year terms concurrently to be followed by a probationary period of three years. The fine was paid.

He was committed to the United States Marshal for the Western District of Texas, pending a definite designation of the place of confinement for service of the sentence imposed, and was delivered to the United States Penitentiary at Leavenworth, Kansas, on December 19, 1953.

In August 1956, in the United States District Court for the Western District of Texas, the relator, pursuant to Title 28 U.S.C., Section 2255, filed a motion to correct sentence on the ground that the five-year sentences were excessive and that sentences not exceeding one year should have been imposed under Title 26 U.S.C., Section 3616(a). This motion was denied and an appeal was taken to the United States Court of Appeals for the Fifth Circuit. On September 22, 1956, the United States Court of Appeals for the Fifth Circuit deferred action on the appeal pending the decision of the Supreme Court in the case of *United States* v. *Achilli*, 234 F. 2d 797. On October 23, 1956, relator made application to the District Court for release on bail, which was denied. On February 14, 1957, application for release on bail was made to the United States Court of Appeals for the Fifth Circuit. This application was also denied. On February 18, 1957, the relator made application to the Supreme Court for release on bail, and on March 11, 1957, the Supreme Court entered an Order admitting him to bail pending the disposition of the Achilli case, upon executing a bail bond in the sum of $25,000.00. On March 18, 1957, bond having been posted, the United States District Court for the Western District of Texas at Austin ordered the release of relator pursuant to the

conditions of the bond, and subject to further orders of that Court and the Appellate Courts. On March 19, 1957, he was released from the United States Penitentiary, Leavenworth, Kansas. At the time of his release there remained three months and twenty days to be served on the Texas sentence imposed by the United States Court of Texas for the Western District, to be eligible for mandatory release by virtue of the statutory good time that he was credited with an addition to thirty-five days additional good time. On May 27, 1957, the Supreme Court affirmed the decision of the lower Court in *Achilli* v. *United States*, 353 U.S. 373. On June 28, 1957, the Court of Appeals for the Fifth Circuit, on the authority of the Achilli decision affirmed the District Court's denial of the motion to correct relator's sentence, 245 F. 2d 466. On July 25, 1957, relator's petition for writ of certiorari was filed in the Supreme Court. On October 14, 1957, the Supreme Court denied the writ of certiorari, 355 U.S. 834. On October 16, 1957, relator surrendered to the United States Marshal at Philadelphia. On October 17, 1957, relator was released from the custody of the Marshal pending the decision on the instant petition for writ of habeas corpus, bail having been fixed in the amount of $5,000.00.

After having been released from the United States Penitentiary on March 19, 1957, relator reported to Hubert A. Boyd, the Chief United States Probation Officer in Las Vegas, Nevada, from March 21, 1957, until October 23, 1957. The condition of probation of the Nevada District sentence of September 3, 1952, was that he should report every sixty days to the United States Probation Officer. There was no violation of any of the conditions of this probation. The Probation Officer, in addition to the requirements of the probation imposed upon relator on September 3, 1952, which continued until September 3, 1957, required relator to report by personal contact not less than once a week from his release date of March 19, 1957, until October 23, 1957, and relator reported in the same manner as a parolee

or a person who was conditionally released for supervision. Relator, during the entire period that he was under supervision, reported faithfully and conscientiously throughout.

Relator's contention is that he is entitled to his release forthwith, on the ground that the United States exercised restraint over him by requiring him to report as a parolee for a longer period than his unexpired sentence.

This is a case of first impression on the facts, but the applicable principles are quite clear. The heart of the matter is that, when relator was released on bond by order of the Supreme Court he was under no restraint other than the usual limitation of action imposed on one released on bail. But, the Nevada Probation Officer required relator to report in the same manner as a parolee from March 19, 1957, to October 23, 1957, a period far greater than the three months and eighteen days[1] remaining to be served under his sentence. Since reporting on parole is an ameliorated imprisonment, unless other factors in this case effect our judgment, we believe that relator earned confinement time during that period, and is now entitled to his release.

The rule that parole is in legal effect imprisonment was first laid down by the Supreme Court in *Anderson* v. *Corall*, 263 U.S. 193:

> Mere lapse of time without imprisonment or other restraint contemplated by the law does not constitute service of sentence * * * The parole authorized by the statute does not suspend service or operate to shorten the term. While on parole the convict is bound to remain in the legal custody and under the control of the

[1] There were two days which relator spent in jail in Philadelphia on October 16 and 17, 1957, after his surrender to the United States Marshal, which reduced the time remaining to be served on the Texas sentence from three months and twenty days to three months and eighteen days.

> warden until the expiration of the term, less allowance, if any, for good conduct. While this is an amelioration of punishment, it is in legal effect imprisonment.

In varying forms, the same principle—that living as a parolee under supervision is constructive custody and not liberty—has been laid down in many other cases. *Jenkins* v. *Madigan*, 211 F. 2d 904; certiorari denied 348 U.S. 842; *Minder* v. *Assistant Director, Bureau of Pardons and Paroles*, 229 F. 2d 432; *United States* v. *Nicholson*, 78 F. 2d 468; certiorari denied, 296 U.S. 573; *United States* v. *Dillard*, 102 F. 2d 94; *United States* v. *Thompson*, 47 F. Supp. 150; affirmed, 135 F. 2d 626, and *Gould* v. *Taylor*, 153 F. Supp. 71.

The respondent is thoroughly familiar with the principle but argues that it is inapplicable in this case since relator was not on parole. The answer to this argument is that while he was not on parole de jure, he was so de facto and bound to conduct himself accordingly. We deem such circumstances sufficient to justify application of the same principle.

The respondent next argues that, so far as the Texas sentence is concerned, the contact relator maintained with the Nevada Probation Officer was strictly a matter between them; it lacked any official sanction or direction by the Parole Board or otherwise and, consequently, is without legal significance in relation to service of the remainder of his sentence. In rejecting this argument we point out that the test is not whether or not relator was granted parole by the Parole Board, but how the actual situation appeared to the relator. Undoubtedly, from his own past personal experiences it must have appeared to the relator that the Nevada Probation Officer had the authority to require the relator to personally contact him not less than once a week during the period in question. It is immaterial that said Officer may have lacked such authority.

It is likewise immaterial, we think, that said Officer was mistaken about relator's status. In *United States* v. *Jones*, 147 F. Supp. 268, the prisoner had elected not to serve his sentence but was taken to the penitentiary by mistake notwithstanding. It was held that the prisoner was entitled to credit for the time actually spent in the penitentiary. Again, in *Price* v. *McGuinness*, 269 Fed. 977, the prisoner was given the same credit for good conduct time for an improper confinement in a jail as if he had been properly confined in a penitentiary.

Finally, the respondent argues that relator's assertion that service of sentence continued after March 19, 1957, is without any support whatsoever for the reason that relator elected not to serve his sentence by petitioning the Court for release on bail. On account of the views already expressed herein we need hardly discuss this argument. It is enough to say, we think, that while relator was freed on bail by the Supreme Court at his own election, had no restraint been imposed upon him by a Federal Officer during the period in question we would have a different case; but in view of the restraint to which he was in fact subjected, it is begging the question to urge that he was at liberty.

Thus, we sustain relator's contention and hold that relator earned confinement time during the period he was required to report to the Nevada Probation Officer in the same manner as a parolee, which time is in excess of the period remaining to be served under his sentence, and is now entitled to his release.

The petition of the relator, L. B. Binion, for writ of Habeas Corpus will accordingly be granted. Counsel for relator will forthwith prepare and submit an appropriate order.

APPENDIX G

IN THE UNITED STATE DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. M-1888. Filed Dec. 23, 1958.

UNITED STATES OF AMERICA, EX REL L. B. BINION

v.

WILLIAM A. O'BRIEN, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Order

And now, to wit, this 22nd day of December A.D. 1958, in accordance with the opinion rendered by this Court dated December 17, 1958, it is ordered, adjudged and decreed, that the petition of the relator, L. B. Binion, for writ of habeas corpus be and the same is hereby granted; it is further ordered that the relator, L. B. Binion, be and is hereby released from custody of the respondent; and it is further ordered that a return to the Writ and further hearings are unnecessary.

WELSH, *J.*